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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RORRY P. ROCHE,

Defendant and Appellant.

D052259

(Super. Ct. No. SCD207574)

APPEAL from a judgment of the Superior Court of San Diego County, Roger W. Krauel, Judge. Affirmed.

A jury convicted Rory Patrick Roche of first degree residential burglary (Pen. Code, § 459; count 1)<sup>1</sup> and receiving stolen property (§ 496, subd. (a), count 2). In bifurcated proceedings, Roche admitted his prior convictions for vehicle theft (Veh. Code, § 10851, subd. (a)) and burglary (§ 459), which was a probation denial prior

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise stated.

(§ 1203, subd. (e)(4)), a strike prior and a serious felony prior under the "Three Strikes" law (§§ 667, subds (a)(1), (b)-(i), 668, and 1170.12.).

The court denied his motion to strike a strike prior, and sentenced him to nine years in prison on count 1 as follows: the lower term of two years, doubled to four years under section 667, subd. (e)(1), plus five years under section 667 subd. (a)(1), and stayed the sentence on count 2 under section 664.

Roche contends (1) insufficient evidence supported his conviction and (2) the trial court erred in denying his motion to strike the strike prior. We affirm.

#### FACTUAL AND PROCEDURAL SUMMARY

San Diego Police Officer David Speck testified that on July 1, 2007, he and other police officers searched Roche's home and found a laptop.<sup>2</sup> The police turned on the laptop and discovered on it a reference to Martin Niehaus's address in Pacific Beach, which was located a few blocks from Roche's home. Niehaus told Speck the laptop belonged to Niehaus's house guest, Robert Fenwick.

Based on this information, Speck interviewed Roche, who stated as follows: he entered Niehaus's house through the front door, which was partially open. He called for Niehaus a few times. He stayed approximately five minutes and took the laptop. He knew Niehaus for approximately one year, and had visited his apartment four times. His relationship with Niehaus was such that he could visit Niehaus's apartment at any time. He had intended to return the laptop after "messaging about with it."

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<sup>2</sup> The parties stipulated the search was lawful.

Niehaus testified that on June 27, 2007, he went to bed at approximately 10:30 p.m. The next day, he noticed his keys were missing. Robert Fenwick was staying with him and owned the laptop computer that was stolen. Niehaus had met Roche at a party in approximately June 2007, and considered him merely an acquaintance. Niehaus did not recall that Roche had ever been to his apartment. Their relationship did not permit Roche to visit Niehaus's apartment unannounced. Niehaus had never been to Roche's house and did not know where he lived or have his phone number.

Fenwick testified he was outside Niehaus's apartment working in a garage late on June 27, 2007, and went to bed at approximately 1:00 a.m. the next day. He never gave Roche permission to enter Niehaus's apartment or to take the laptop. Fenwick had seen Roche at Niehaus's apartment approximately "a few months" earlier, when Roche returned a stereo component to someone called Jen, who was staying with Niehaus.

## DISCUSSION

### I.

Roche contends there was insufficient evidence that he had the intent to permanently deprive Fenwick of his computer when he entered Niehaus's apartment.

When sufficiency of the evidence is challenged on appeal our role in reviewing the evidence is limited. We do not reweigh the evidence and substitute our judgment for that of the jury. (*People v. Escobar* (1996) 45 Cal.App.4th 477, 481.) Instead, we must determine whether any rational trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Jones* (1990) 51 Cal.3d 294, 314.) "When reviewing a claim of insufficiency of the evidence to support a conviction, we view the entire record

in the light most favorable to the judgment and presume the existence of every fact the trier of fact could reasonably deduce from the evidence in support of the judgment." (*People v. Abrego* (1993) 21 Cal.App.4th 133, 136.) This standard applies whether direct or circumstantial evidence is involved. (*People v. Prince* (2007) 40 Cal.4th 1179, 1251.) This court's authority begins and ends with a determination of whether any substantial evidence, disputed or not, supports the verdict. Thus, where the record discloses substantial evidence — that is reasonable, credible and of solid value — we accord due deference to the trier of fact. (*People v. Jones, supra*, 51 Cal.3d at p. 314.)

Roche's conviction was supported by substantial evidence. Roche did not seek or obtain from Fenwick or Niehaus permission to enter the apartment or to take the laptop. According to their testimony, their relationship with Roche was not sufficiently close for him to enter the apartment unannounced after 10:00 p.m. and take the laptop. Moreover, Roche never informed them that he had taken the laptop. Under these circumstances, the jury reasonably concluded that Roche entered the apartment with the intent to permanently deprive the owner of the laptop. " '[T]here is no better proof that [defendant] entered the [victim's house] with intent to commit robbery than a showing that he did in fact commit robbery after his entry.' " (*People v. Abilez* (2007) 41 Cal.4th 472, 508.)

## II.

We reject Roche's contention the trial court abused its discretion in refusing to strike his prior strike under *People v. Romero* (1996) 13 Cal.4th 497. At sentencing, the trial court told Roche: "The sentence in this case reflects not only the nature of this case

but takes into account your history. I can't do anything about the history. You gave me the history, and I have to take that into consideration. [¶] . . . [¶] But I don't find any basis for striking the prior strike. I think this is the spirit of the [T]hree [S]trikes law is that if you find someone who — that is a career criminal, you keep going with the strike probations [*sic*] and you don't strike the prior strike. That's what we have here."

The California Supreme Court held, "[I]n ruling whether to strike or vacate a prior serious and/or violent felony conviction allegation or finding under the Three Strikes law, on its own motion, 'in furtherance of justice' pursuant to [section 1385, subd. (a)], or in reviewing such a ruling, the court in question must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*People v. Williams* (1998) 17 Cal.4th 148, 161.)

The California Supreme Court further explained, "[T]he [T]hree [S]trikes law not only establishes a sentencing norm, it carefully circumscribes the trial court's power to depart from this norm and requires the court to explicitly justify its decision to do so. In doing so, the law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper. [¶] In light of this presumption, a trial court will only abuse its discretion in failing to strike a prior felony conviction allegation in limited circumstances. . . . [¶] But '[i]t is not enough to show that reasonable people might disagree about whether to strike one or more' prior conviction allegations.

[Citation.] . . . '[w]here the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court's ruling, even if we might have ruled differently in the first instance' [citation]. Because the circumstances must be 'extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack' [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary." (*People v. Carmony* (2004) 33 Cal.4th 367, 378 (*Carmony*).)

Based on *Carmony's* criteria and Roche's criminal history, we conclude the trial court did not abuse its discretion. The court read and considered the probation report, which stated Roche was committed as a juvenile ward following allegations of battery and driving under the influence of alcohol. As an adult, he suffered a felony conviction for vehicle theft (Veh. Code, § 10851, subd. (a)) and a misdemeanor conviction for driving with a suspended license. The prior strike was for first degree robbery, and he was on probation for that conviction when he committed the underlying crimes. Roche has not demonstrated his criminal history puts him outside of the three strikes scheme.

DISPOSITION

The judgment is affirmed.

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O'ROURKE, J.

WE CONCUR:

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BENKE, Acting P. J.

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NARES, J.